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Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD STEVEN PHILLIP,
Petitioner,

v.

RANDY LEE, Warden,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fourth Circuit

APPENDIX

PAUL M. GREEN
Counsel of Record
1304 CAROLINA AVE.
DURHAM, N.C. 27705-3206
(919) 286-2212

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22 pp

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
94 CBS 70261, 70262

RONALD STEVEN PHILLIP
Petitioner,
vs. ORDER
STATE OF NORTH CAROLINA,
Respondent.

THIS CAUSE COMING ON TO BE HEARD, and being heard before the Honorable Howard R. Greeson, Jr., presiding Superior Court Judge, upon a Motion for Appropriate Relief filed with this Court on or about May 11, 1998. This matter came on for hearing on June 24, 1998 in Guilford County Superior Court, High Point Division The Petitioner was not present but was represented by Paul M. Green of the Durham County bar. The State was represented by Assistant District Attorney, Randy Carroll.

In his motion the Petitioner alleges:

1. The State intimidated witness Gregory Gilley (Sanders) in violation of Petitioner's rights under the United States and North Carolina Constitutions.

2. Petitioner's counsel was ineffective in failing to object to the State's intimidation of Gregory Gilley and presentation of his coerced testimony in its case in chief.

3. Counsel's continued representation of Petitioner after defense witness Gregory Gilley admitted to perjury was ineffective due to a resulting conflict of interest between attorney and client and damage to counsel's credibility; and

4. Petitioner is entitled to a new trial based on the record or, in the alternative, to an evidentiary hearing.

Based upon the Motion filed by the Petitioner, the answer filed by the State and the records in this case and the statements and arguments of counsel, the Court concludes that only legal issues are presented and that the Court may resolve these issues without conducting an evidentiary hearing pursuant to G.S. 15A-1420(c).

After conducting a non-evidentiary hearing in this case, the Court makes the following FINDINGS OF FACT:

1. Petitioner was arrested on October 25, 1994 and charged with trafficking in cocaine.

2. Petitioner was indicted for Trafficking by Possession of Cocaine in 94 CRS 70261 and Trafficking by Transportation of Cocaine in 94 CRS 70262 on March 20, 1995. Assistant Public Defender, David Clark, was appointed to represent Petitioner.

3. Rodney Squires was indicted as a CO-defendant and charged with the same offenses as Petitioner. Attorney Richard Dailey was appointed to represent Squires.

4. The Squires case was called for trial first; it was called by the State on June 21, 1995 before the Honorable Catherine Eagles, presiding Superior Court Judge.

5. A witness was called by the Defendant Squires in his case who testified that his name was Gregory Sanders. He eventually testified that because of something to do with his adoption his name was actually Gregory Gilley but that both names were legally his. Throughout the remainder of this

order, this witness will be referred to simply as "Gilley."

6. Attorneys for both Squires and Philip had an opportunity to talk to Gilley prior to his being called as a witness in Squires' trial. Gilley testified that both attorneys advised him that he could not be charged with anything in North Carolina based on his statement to them.

7. When Gilley took the stand for the defense in Squires' trial, his testimony exculpated both Defendants by admitting possession of the very drugs for which Squires was being tried.

8. David Clark, counsel for the Petitioner herein, Phillip, was present during the testimony of Gilley.

9. After Gilley testified, he was approached by law enforcement in the men's room of the courthouse where he was placed under arrest for possession of a controlled substance based upon his sworn testimony claiming ownership of the very drugs for which Squires was being tried.

10. He was advised of his Miranda rights and thereafter gave a contrary statement to law enforcement.

11. He admitted that be had just lied under oath and gave false testimony pursuant to an arrangement worked out between he and Petitioner.

12. Gilley's new statement was inculpatory as to both Defendants; he also admitted he had lied under oath about his age and social security number.

13. Gilley was then taken before the magistrate where be was booked on the charge of perjury.

14. The next morning the state moved that it be allowed to re-open its evidence after advising Judge Eagles about what had developed the previous evening. During that hearing Richard Dailey, counsel for the Defendant Squires, objected to the State calling Gilley as a witness and moved for a mistrial based on these same events. After hearing arguments of counsel for both the State and the Defendant Squires, the Court denied the motion for a mistrial and allowed the State's motion to re-open its case.

15. Gilley was then called as a rebuttal witness for the State and gives a different statement from what he had given under oath the previous day. He admitted to lying under oath and gave testimony that now incriminated both Squires and Petitioner.

16. The jury returned verdicts of guilty as charged in both charges against Squires.

17. The State called Petitioner's case for trial on June 28, 1995 before the Honorable Charles Lamm, presiding Superior Court Judge.

18. In the interim, counsel for Petitioner sent his investigator, Richard Jackson, to the Guilford County jail in Greensboro to talk with Gilley.

19. Gilley was called to testify for the State against Petitioner in its case in chief and gave essentially the same testimony as be did when he testified as a rebuttal witness for the State in Squires' trial.

20. Gilley was cross examined at length in a very skillful and aggressive manner by David Clark, counsel for Petitioner. David Clark represented Petitioner at his trial with full knowledge that Gilley had recanted his original story and had

admitted that be had lied under oath the first time be testified and effectively pointed out Gilley's admitted lies to the jury.

21. There was no direct evidence brought out in either Petitioner's or Squires' trial that Gilley was intimidated, threatened or coerced to change his testimony by either the prosecutor or law enforcement. Petitioner cited *State v Melvin,* 326 NC 173 and *State v Mackey,* 58 NCAPP 385 to support his contention that his constitutional due process rights were violated by the state's coercing Gilley to change his testimony. However, the Court notes that in both of those cases there was direct evidence of intimidation of a witness by either the prosecutor, law enforcement or both.

22. The Court finds there was no prosecution intimidation of Gilley like what occurred in *Melvin* and *Mackey.* Also, the compulsion in those cases occurred at the trial of the defendant and the compulsion, if any, in this case occurred at the CO-Defendant's trial.

23. David Clark, trial counsel for Petitioner, had full notice of what Gilley was going to say and knew that he had repudiated his earlier testimony.

24. All of these circumstances were also known to appellate counsel for Petitioner.

Based upon the foregoing findings of fact, the Court makes the following CONCLUSIONS OF LAW:

1. That Petitioner was in a position to adequately raise these issues on direct appeal to the North Carolina Court of Appeals but failed to do so and his motion is subject to denial pursuant to G.S. 15A-1419(a)(3).

2. That Petitioner cannot demonstrate good grounds to excuse the denial of his motion pursuant to G.S. 15A-1419(b) nor has he demonstrated that denial of his motion will result in any prejudice or will result in a fundamental miscarriage of justice.

3. That the conduct of the prosecutor and law enforcement in their dealings with the witness Gilley did not constitute intimidation

4. That no errors were made by David Clark in his representation of Petitioner, especially none that would rise to the level of ineffective assistance of counsel as contemplated by *Strickland v Washington*, 466 US 668 (1984).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Petitioner's Motion for Appropriate Relief be and the same is hereby denied in each and evey respect. IT IS FURTHIR ORDERED that the Clerk of Superior Court of Guilford County shall cause a copy of this Order to be forwarded to Paul M. Green, counsel for Petitioner, to the Petitioner, the State Department of Correction, the Parole Commission and the Office of the District Attorney for the Eighteenth Judicial District, High Point Division.

This the 10th day of July, 1998.

/s/ Howard R. Greeson, Jr.
Presiding Superior Court Judge

No. COAP98-516
North Carolina Court of Appeals
****

STATE OF NORTH CAROLINA

From Guilford
V (94 CBS 70261, 70262)

RONALD STEVEN PHILLIP

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ORDER

The following order was entered:

The petition filed in this cause on the 24th day of August 1998 designated "Petition for Writ of Certiorari" is denied.

By order of the Court this the 14th day of September 1998.

The above order is therefore certified to the Clerk of Superior Court Guilford County.

Witness my hand and official seal this the 14th day of September 1998.

/s/ John H. Connell
Clerk of North Carolina Court of Appeals

CSC Orig
cc:
Mr. Paul M. Green
Hon. Randy Carroll
Ms. Gail E. Weiss

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RONALD STEVEN PHILLIP,	)	
Petitioner,	)	
v.	)	**1:99CV00243**
RANDY LEE, Warden,	)	
The Attorney General of the	)	
State of North Carolina, et al.,	)	
Respondents.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Ronald Steven Phillip, a prisoner of the state of North Carolina. brought this federal habeas action pursuant to 28 U.S.C. § 2254 challenging the constitutional validity of the sentence imposed for his trafficking cocaine by possession and transportation conviction in Guilford County Superior Court in cases 94 CRS 70261 and 94 CRS 70262. (Docket Nos. 2 & 6) Petitioner appealed. but the North Carolina Court of Appeals affirmed and the North Carolina Supreme Court denied certiorari. *Id.*

On May 8. 1998, Petitioner filed a motion for appropriate relief (MAR). A non-evidentiary hearing was held on June 24. 1998 in the Guilford County Superior Court, at which Petitioner was represented by present counsel, Mr. Paul M. Green. The MAR was denied on July 10, 1998 by Superior Court Judge Greeson, Jr. Petitioner then submitted a petition for certiorari to the North Carolina Court of Appeals which was denied on September 14. 1998. *Id.*

The Habeas Corpus Petition

Petitioner, through counsel, filed the present federal habeas petition on March 26, 1999. (Docket No. 1) A review

of the state court record reveals that Petitioner has raised the substance of his present claims in state court as required by 28 U.S.C. § 2254(b)(1)(A). Accordingly, Respondents concede that Petitioner has exhausted his state remedies. (Docket No. 4, ¶ 2) Respondents move to dismiss on the grounds that the one-year limitations period ran before Petitioner filed his federal habeas. (Docket Nos. 5 & 6) Petitioner replies that his habeas petition is not barred by the one-year limit and, further, the one-year limit should be equitably tolled because Petitioner was allegedly never sent notice that certiorari had been denied on September 14, 1998 by the North Carolina Court of Appeals. (Docket Nos. 9 & 10) These matters are now before this Court for a ruling. *See* Rule 8, Rules Governing § 2254 Cases.

DISCUSSION

Respondent's statute of limitations affirmative defense will be considered first. The one-year limitations period applicable to § 2254 habeas petitions is set forth in 28 U.S.C.A. § 2244(d)(l). The statute provides, in applicable part, that the one-year limit begins to run on the date judgment became final by the conclusion of direct review or the expiration of the time for seeking such review and, further, that the time in which a properly filed application for state post-conviction relief is pending shall not be included in the one-year limitations period. *See* 28 U.S.C.A. § 2244(d)(2).

Both parties agree that Petitioner's one-year period began running on July 9, 1997. (Docket No. 10, Petitioner's Br. in opposition to Respondent's motion for summary judgment at 3; Docket No. 6, Respondent's Br. in support of motion for summary judgment at 3) In addition, both parties agree that tolling pursuant to 28 U.S.C. § 2244(d) would begin on May 8, 1998 when Petitioner filed his MAR. Further, both parties agree that tolling pursuant to § 2244(d)

would cease as of September 14, 1998, when the North Carolina Court of Appeals denied certiorari review of the denial of Petitioner's MAR. Recently, the Fourth Circuit decided *Taylor v. Lee,* 186 F.3d *557,* 561 (4th Cir. 1999), *cert. denied,* ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2000 WL 220371 (2000), in which it held that the one-year limitations period of § 2244(d) is tolled for the entire pendency of state post-conviction proceedings, i.e., from the initial filing to the final disposition by the highest state court. Applying *Taylor,* the one-year limit for Petitioner was tolled 130 days (July 9, 1997 to September 14, 1998), and, as Petitioner asserts, the limitations period for Petitioner ran on November 16, 1998. (Docket No. 10, Petitioner's Br. in opposition to Respondent's motion for summary judgment at 6) Petitioner submitted his habeas petition for filing no earlier than his signature date of March 4, 1999 and, under the applicable statutory language, this petition is, indeed, untimely.

The matter does not end there, however, because Petitioner asserts that the limitations period can be equitably tolled and that the circumstances of his case justify so doing. Specifically, Petitioner claims that the North Carolina Court of Appeals either did not send, or the United States Postal System did not deliver, the September 14, 1998 notice of denial of certiorari to counsel for Petitioner. Consequently, Petitioner contends that, at the least, the period of time from September 14, 1998 to February 17, 1999 (the date when Petitioner made inquiry--through counsel--about the status of his petition for certiorari) should be equitably tolled.

Petitioner cites no Fourth Circuit authority, nor is this Court aware of any, holding that the one-year period set forth in § 2244(d) is a statute of limitations subject to equitable tolling. Respondent contends that it is not. However, the Fourth Circuit has previously described the one-year period as a "statute of limitations." *Brown v. Angelone,* 150 F.3d 370, n. 1 & 373 (4th Cir. 1998). Further, in each circuit which has

addressed the question, the appellate court has concluded that either the limitations period of 22 44(d), or the analogous one-year limit of 28 U.S.C. § 2255, is an ordinary statute of limitations subject to the doctrine of equitable tolling. *Miller v. New Jersey State Dept. of Corrections,* 145 F.3d 616, 618 (3rd Cir. 1998)(section 2244(d)(1) is statute of limitations subject to equitable tolling; case remanded to district court for consideration of equitable tolling issue); *Davis v. Johnson,* 158 F.3d 806. 811 (5th Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 1474, 143 L.Ed.2d 558(1999) (limitations period does not circumscribe federal jurisdiction, and can be equitably tolled in appropriate, albeit extraordinary circumstances); *Moore v. United States,* 173 F.3d 1131, 1134 (8th Cir. 1999)(one-vear limitations period of 28 U.S.C. § 2255 is a limitations period, not a jurisdictional bar); *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir.), *cert. denied,* ___ U.S. ___, 119 S. Ct. 210, 142 L.Ed.2d 173 (1998) (section 2244(d) is not jurisdictional and is subject to equitable tolling); *Sandvik v. United States,* 177 F.3d 1269, 1271 (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied,* ___ F.3d ___ (2000) (one-year provision of § 2255 is limitations period, subject to equitable tolling). *Cf. Taliani v. Chrans,* 189 F.3d 597, 598 (7th Cir. 1999)(one-year limit of section 2244 is limitations period, not jurisdictional bar, and is, in theory, subject to doctrine of equitable tolling; statutorily provided equitable tolling provisions of section 2244(d)(1)(D) may, however, leave nothing for judge-made doctrine of equitable tolling). Thus, the weight of persuasive authority favors Petitioner's contention that the one-year limit may be equitably tolled.

Some circuits have formulated principles for equitable tolling in the habeas context, and have stated that a petitioner seeking this remedy must show that extraordinary circumstances, beyond his control and unavoidable even with the exercise of diligence in pursuing his claims, prevented his compliance with the one-year limit. *Sandvik,* 177 F.3d at

1271; Jones v. Morton, 195 F.3d 153, 159 (3rd Cir. 1999) (habeas statute of limitations will not be tolled when the petitioner made no showing of unfairness, e.g., that he diligently pursued his claims and that he was prevented, in some extraordinary way, from asserting his rights). *See also Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999) ("We will permit equitable tolling of AEDPA's limitations period 'only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time,' i.e., when external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim."), *citing Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir.1998)(en banc), *cert. denied,* ___ U.S. ___, 119 S. Ct. 1377, 143 L.Ed.2d *535* (1999) *and Calderon (Kelly),* 163 F.3d at 541. In reviewing a habeas petition, the Fifth Circuit noted that, in general, equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights--a garden variety claim of excusable neglect does not support equitable tolling. *Coleman v. Johnson,* 184 F.3d 398, 402, (5th Cir.) *rehearing and suggestion for rehearing en banc denied,* 196 F.3d 1259 (1999).

Cases in which equitable tolling was granted did, indeed, involve extraordinary factual circumstances in which the actions of others, beyond the petitioner's control, prevented the petitioner from timely presenting his claims. *United States v. Miller,* 197 F.3d 644, 652-3 (3rd Cir. 1999)(where district court *sua sponte* construed petitioner's earlier collateral attacks, which were filed within the one-year time period, as § 2255 motions over petitioner's protest and then dismissed on the merits, which petitioner then appealed, one-year limitations period would be tolled for the petitioner's later § 2255 motion so that he could bring all his claims in one

§ 2255 motion); *Davis,* 158 F.3d at 806-12 (equitable tolling appropriate where district court initially granted extensions well beyond one-year limit for filing federal habeas, then found habeas untimely on basis that the extensions had been beyond the power of the court to grant); *Prunty,* 187 F.3d at 1107 (because incarcerated *pro se* litigant had to depend on prison authorities to draw on his trust account, prepare a check for the habeas filing fee, and mail his check and petition to the district court, delay on the part of prison officials in complying was not within the petitioner's control and, consequently, such delay could be equitably tolled).

On the other hand, courts found that equitable tolling is not justified where the petitioner demonstrated a lack of diligence, whether that lack of diligence occurred prior to, or after, seeking state remedies. *Ott v. Johnson,* 192 F.3d 510, 514 (5th Cir. 1999) (refusal to invoke doctrine of equitable tolling with respect to untimely federal habeas corpus petition was not abuse of discretion where inmate waited to file his state habeas application just one day before expiration of one-year "grace period" for filing federal petition, inmate allowed himself little time to file federal petition once state petition was denied and the tolling of grace period ended); *Coleman,* 184 F.3d at 403 (state prisoner did not diligently pursue federal habeas relief and was not entitled to equitable tolling for approximately seven-week gap between date he submitted state petition for post-conviction relief to prison officials and date petition was stamped as filed, where prisoner waited approximately six months after denial of his state petition before filing his federal habeas petition); and *Fisher v. Johnson,* 174 F.3d 710, 715-6 (5th Cir.), *rehearing and suggestion for rehearing en banc denied,* 189 F.3d 471 (1999) (seventeen-day period in which petitioner was confined in a psychiatric ward, medicated, separated from his glasses and hence rendered legally blind, and denied meaningful access to legal materials did not justify equitable tolling of limitations period for filing habeas petition since

petitioner still had over six months to complete his federal habeas petition after his return to his usual quarters). Further, a petitioner's attorney's error or lack of diligence is chargeable to the petitioner. *Taliani,* 189 F.3d at 598 (lawyer's mistake in miscalculating the one-year limitations period would not justify equitable tolling); *Sandvik,* 177 F.3d at 1272 (equitable tolling of the limitations period was not appropriate where defense counsel sent defendant's motion by ordinary mail from Atlanta less than a week before it was due in Miami, and the untimely filing could have been avoided by mailing motion earlier or by using private delivery service or even private courier).

Courts have also found equitable tolling unjustified where the circumstances fall short of extraordinary. *Turner v. Johnson,* 177 F.3d 390, 392 (5th Cir.), *cert. denied,* ___ U.S. ___, 120 S. Ct. 504, 145 L.Ed.2d 389 (1999) (neither petitioner's unfamiliarity with legal process nor his lack of representation during applicable filing period merits equitable tolling of the one-year period of limitations on federal habeas petitions, regardless of whether this unfamiliarity is due to illiteracy or any other reason). In another case, the court was persuaded that equitable tolling was not justified based upon the petitioner's own inaction and the lack of any affirmative misconduct on the part of prison officials which could have lulled the petitioner into inaction. *Paige v. United States,* 171 F.3d 559, 561 (8th Cir. 1999) (interprison mail delay, when motion was drafted by defendant's brother and sent to him from a different prison, did not justify equitable tolling, since defendant chose someone in another prison to draft his motion and, when the deadline drew near, defendant could have drafted his own motion or sought the help of a legal aide in his own prison, and no affirmative misconduct on the prison's part lulled defendant into inaction).

In the instant case, the Court need not reach the issue of whether equitable tolling of the one-year limit is available because, even if it were, Petitioner has not demonstrated that

it is justified here. First, as Respondent notes, Petitioner did not act with diligence. Under the limitations provision of section 2244. a petitioner is allowed one year in which to complete all the state post-conviction remedies necessary to exhaust his claims (not including the time the action is pending) *and* to prepare and file his federal habeas petition. Petitioner allowed all but two months of this one-year period to expire before *beginning* his state post-conviction remedies. Petitioner fails to explain this delay. Whether or not it can be said that counsel's action—waiting over five months before inquiring about the status of the petition for certiorari when he knew or should have known that petitioner had little time left in his one-year period—constitutes diligence, Petitioner's previous lack of diligence—waiting ten months before filing his MAR—forecloses equitable tolling. The Court notes that had Petitioner expeditiously pursued his MAR, the five months counsel waited would have been of no consequence.

With reference to counsel's part in these circumstances, counsel states that he moved his office at the beginning of August, 1998. (Pr. Appendix of Exhibits, Declaration of Paul Green) He states that he informed the state court of his changed address by letter dated August 4, 1998 but that as late as August 10, 1998 the Clerk of Guilford County Superior Court had sent counsel an order addressed to counsel's *old* address. Counsel offers this in support of his position that the state court may have mis-addressed the copy of the order which was to be sent to counsel. However, an equally valid point is that this should have put counsel on alert that his move may have caused some confusion, and counsel's decision not to call the North Carolina Appeals Court sooner must be considered in light of this fact, as well as the fact that counsel knew, or should have known, that Petitioner had already allowed ten months out of his one-year period to elapse before filing a MAR.

Counsel further reports that on September 9 and November 9 of 1998, and again on January 11, 1999, he

wrote to Petitioner, informing him that he was waiting to hear from the North Carolina Appeals Court. In November, counsel states that he told Petitioner that "we are just awaiting a decision by the Court. A decision could come any day, or could be months in the future. There is simply no way for me to predict when the Court will act." *(Id.,* ¶ 7) While it is true that counsel could not *predict* when the court would act, he could have simply called to check on the status of the writ for certiorari. Despite his concern, counsel waited until February, 1999 to make his inquiry. Counsel made a decision in each instance, first in September, then in November, and again in January, to take the time to write Petitioner, but to not take the time to inquire about the status of the petition for certiorari. Had counsel called the state court in November, he would have found out about the denial of the petition for certiorari *prior to* the running of the one-year period. Petitioner may be charged with counsel's actions and the foregoing facts demonstrate that the alleged lack of notice was not a circumstance external to Petitioner—rather, based on the facts as alleged, counsel's choice not to inquire was a contributing cause for any lack of notice. This weakens the proposition which Petitioner must establish, that he was prevented from filing by external circumstances beyond his control. Moreover, while the foregoing facts, taken individually, might not indicate a lack of diligence on counsel's part, these facts taken together also make counsel's diligence a close question.

Further, although Petitioner lays the blame for the five month delay on either the United States Postal Service or the state court, Petitioner has demonstrated no reason that this must be so. In his declaration, counsel states:

> Undersigned counsel never received his copy of the September 14, 1998 Order in the mail. My office is in my home, my mail is delivered directly through my

front door, and I personally review the incoming mail every day. I did not receive it.

(Pr. Appendix of Exhibits, Declaration of Paul M. Green, ¶ *6)* This statement does not set forth with particularity the conditions at counsel's home and fails to address directly, or account for, the possibility that the order was lost by someone other than counsel after the mail was delivered but prior to counsel's personal review.

The Court also notes the difficulty of Petitioner's proof. Even viewing all of Petitioner's allegations in the light most favorable to him, at best he could be said to have established that counsel's copy of the order denying certiorari was lost sometime between when the North Carolina Court of Appeals issued the order and the time when counsel personally reviewed his mail, possibly while it was handled by the state court system, the postal system, or by someone at counsel's house. (This would certainly fall short of proof that Petitioner was actively mislead, as the Fifth Circuit has required. *See Coleman,* 184 F.3d 398.) Given the nature of the remedy Petitioner seeks, the mere *possibility* that "external forces" may have been responsible for the loss of the order is simply insufficient to trigger such an extraordinary measure on Petitioner's behalf. Considering all of the facts, especially Petitioner's lack of diligence, it is abundantly clear that the present circumstances simply do not warrant equitable tolling.[1]

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[1] This Court's own research reveals that, in the somewhat analogous situation where a party requests relief from the time limit for filing an appeal based solely on the assertion that the litigant failed to receive notice from the clerk of the entry of an order or judgment, the Fourth Circuit has held that such relief is barred by Fed. R. Civ. P. 77(d). *Hensley v. Chesapeake & O. Ry. Co.*, 651 F.2d 226, 229 (4th Cir. 1981). While it may be noted that Rule 77(d), by its own language, applies only to federal district court clerks, the underlying rationale for the rule, that notification by the clerk is merely for the *convenience* of the litigants, *id.*, is germane to the present circumstances.

Finally, the Court has reviewed Petitioner's claims of witness coercion, ineffective assistance for failing to object to alleged witness coercion, conflict of interest between Petitioner and his trial counsel, and ineffective assistance for alleged failure to raise the foregoing issues on appeal. Ultimately, each of these issues is without merit. Accordingly,

IT IS RECOMMENDED that Respondent's motion for summary judgment (Docket No. 5) be granted, and that judgment be entered dismissing this action.

/s/ P. Trevor Sharp, Magistrate Judge
March 24 ,2000

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RONALD STEVEN PHILLIP,	)	
Petitioner,	)	
v.	)	**1:99CV00243**
NORTH CAROLINA	)	
ATTORNEY GENERAL and	)	
RANDY LEE, Superintendent,	)	
Respondents.	)	

O-R-D-E-R

On March 24, 2000, in accordance with 28 U.S.C. § 636(b), the Recommendation of the United States Magistrate Judge was filed and notice was served on the parties in this action and a copy was given to the court.

Within the time limitation set forth in the statute, counsel for Petitioner objected to the Recommendation.

The court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's report. The court therefore adopts the Magistrate Judge's recommendation.

IT IS THEREFORE ORDERED that Respondents' motion for summary judgment [Pleading no. 5] be **GRANTED,** that Petitioner's motion for habeas corpus [Pleading no. 1] be **DENIED,** and that this action be dismissed with prejudice. A judgment dismissing this action will be entered contemporaneously with this Order. A certificate of appealability is not issued, the court finding that no substantial issue is presented.

/s/ William L. Osteen
United States District Judge
July 20, 2000

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-7141

RONALD STEVEN PHILLIP,
Petitioner-Appellant,
versus
RANDY LEE, Warden, Caledonia Institution,
Respondent-Appellee,
and
NORTH CAROLINA ATTORNEY GENERAL,
Respondent.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge. (CA-99-243-1)

Submitted: November 9, 2000 Decided: November 15, 2000

Before WILKINS, WILLIAMS, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Paul M. Green, Durham, North Carolina, for Appellant.
Clarence Joe DelForge, III, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, for Appellee.

PER CURIAM:

Ronald Steven Phillip appeals the district court's order granting summary judgment to the Respondents and denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 2000). We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. See Phillip v. Lee, No. CA-99-243-1 (M.D.N.C. July 21, 2000).* We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

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* Although the district court's order is marked as "filed" on July 20, 2000, the district court's records show that it was entered on the docket sheet on July 21, 2000. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was physically entered on the docket sheet that we take as the effective date of the district court's decision. See *Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).*